IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KENNETH W. ALLISON and CLARE K. CREIGHTON, husband and wife, Plaintiffs/Appellees/ Counterdefendants, v. HEATH JOHNSTON, Defendant/Appellant/ Counterclaimant.	2 CA-CV 2006-0064 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200400225

Honorable James L. Conlogue, Judge Pro Tempore

AFFIRMED

Joseph J. DeFrancesco, P.C.
By Joseph J. DeFrancesco
Sierra Vista
Attorney for Plaintiffs/
Appellees/Counterdefendants

Little, Remick & Capp, P.L.C.
By Timothy P. Remick
Tucson
Attorneys for Defendant/
Appellant/Counterclaimant

V Á S Q U E Z, Judge.

¶1 Heath Johnston appeals the trial court's grant of summary judgment in favor of Kenneth Allison and Clare Creighton on count one of their quiet title complaint. For the reasons discussed below, we affirm.

Background

¶2 In 2004, Allison and Creighton filed a three-count complaint in Cochise County Superior Court against Johnston. The first count sought to quiet title to the northern thirty feet of their property, free of an easement claimed by Johnston. The second count asserted an alternative claim to the same property by adverse possession and non-use or abandonment by Johnston. In the third count, Allison and Creighton sought to quiet title in a 26.4-foot strip of land owned by Johnston, west of and adjacent to their property, by adverse possession.

¶3 Johnston filed a counterclaim, seeking to quiet title in the 26.4-foot strip of land and in an easement along the northern thirty feet of Allison and Creighton's property. He asserted, *inter alia*, that Allison and Creighton's claims were barred by the doctrine of res judicata, or claim preclusion, because the issues of ownership of the strip of land and easement over the other parcel had been conclusively resolved in his favor in a 1996 lawsuit between them and Johnston's predecessors in interest.

¶4 The parties filed cross-motions for summary judgment on the issue of the thirty-foot easement along the north part of Allison and Creighton's property. In support of their motion, Allison and Creighton argued that no recorded documents had ever created or reserved an easement, and no road had ever existed on that part of their property. They,

therefore, asserted there were no genuine issues of material fact regarding count one and they were entitled to judgment as a matter of law. As he had asserted in his counterclaim, Johnston argued in support of his cross-motion that Allison and Creighton's claim was barred under the doctrine of claim preclusion. He also argued their claim was barred under the doctrine of collateral estoppel, or issue preclusion. Specifically, Johnston argued that the 1996 lawsuit had conclusively resolved in his favor the issue of his entitlement to the thirty-foot easement on Allison and Creighton's property.

¶5 After a hearing,[1] the trial court eventually found "there never was granted a 30 foot easement across the northern 30 foot portion of the property owned by [Allison and Creighton]." The trial court granted summary judgment in their favor on count one of the complaint, certifying the judgment as final and appealable pursuant to Rule 54(b), Ariz. R. Civ. P., 16 A.R.S. Johnston's timely appeal followed.

Standard of Review

¶6 We review a trial court's grant of summary judgment de novo. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 60 P.3d 7, 11 (2003). We view the "evidence and reasonable inferences in the light most favorable to the party opposing the motion." *Id.* The party moving for summary judgment has the burden of showing there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 15, 83 P.3d 56, 60 (App. 2004). Claim preclusion and issue preclusion are issues

[1]Other motions, hearings, and rulings transpired in the interim, none of which is relevant to this appeal. Thus, we do not discuss them.

of law we review de novo. *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 10, 146 P.3d 1027, 1032 (App. 2006).

Discussion

A. Claim Preclusion

¶7 Under the doctrine of claim preclusion, "a final judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same claim." *Dressler v. Morrison*, 212 Ariz. 279, ¶ 15, 130 P.3d 978, 981 (2006); *see also Corbett*, 213 Ariz. 618, ¶ 13, 146 P.3d at 1033. Arizona follows the "same evidence" test for determining whether an action is based on the same cause of action, or claim, asserted in the prior proceeding. *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997). "If no additional evidence is needed to prevail in the second action than that needed in the first, then the second action is barred." *Id.; see also Rousselle v. Jewett*, 101 Ariz. 510, 513, 421 P.2d 529, 532 (1966) ("The relevant test is . . . whether the same cause of action, or one so closely related that its proof depends on the same facts, has once been litigated.").

¶8 Relying on *Phoenix Newspapers*, Johnston asserts that the judgment in the 1996 lawsuit bars Allison and Creighton's claim in this lawsuit because both were quiet title actions involving the same property and, thus, were based on the same claim. To support his argument, Johnston points to one of the trial court's findings of fact in support of the judgment entered in the 1996 lawsuit. The court mentioned that a thirty-foot easement existed across the northern portion of Allison and Creighton's property, apparently based

on Creighton's uncontroverted but mistaken testimony in the 1996 action that Johnston's predecessors in interest had been granted a "legal easement to the north" by a deed.

¶9 However, Allison and Creighton argue that the 1996 quiet title action was based on an entirely different cause of action than the one asserted in this case. The 1996 lawsuit involved Allison and Creighton's quiet title action regarding Johnston's predecessors in interest's claim of a prescriptive easement for a road on the southeastern portion of Allison and Creighton's property. In contrast, this lawsuit involves Allison and Creighton's quiet title action regarding Johnston's claim of an easement purportedly created by a deed on the northern thirty-foot portion of their property. They contend the finding of fact in the 1996 lawsuit "regarding the existence of a 30-foot easement was not an issue nor essential to the decision of that case." We agree. "Under no circumstances can it be said that the issues determined by the judgment [in the 1996 lawsuit] are res judicata of the issues raised in the instant case." *Pinkerton v. Pritchard*, 71 Ariz. 117, 123, 223 P.2d 933, 937 (1950).

¶10 In *Pinkerton*, our supreme court held that prior litigation establishing an easement was not res judicata in a later action to limit the defendant's use of the easement, even though evidence existed at the time of the initial action that it had also been used for a car storage and parking yard. *Id.* at 124, 223 P.2d at 938. The defendant had argued, based on that evidence, the plaintiff should have sought to exclude the additional uses in the prior litigation. *Id*. But in deciding as it did our supreme court determined that "the question as to what use defendant Pritchard was putting the property at the time of the former trial was not a material issue in that case." *Id.*

¶11 Here, although mentioned in the trial court's findings in the previous lawsuit, the thirty-foot easement was not a "material issue" to the asserted cause of action.[2] *Id.* The nature and location of the easements claimed in the two lawsuits are simply different. Accordingly, under Arizona's same evidence test, the two lawsuits are not the same cause of action and Allison and Creighton were not precluded from bringing their claim in count one of this lawsuit. *See Phoenix Newspapers,* 188 Ariz. at 242, 934 P.2d at 806.

B. Issue Preclusion

¶12 Under the doctrine of issue preclusion, a party is barred "from relitigating an issue identical to one [it] has previously litigated to a determination on the merits in another action." *Gilbert v. Bd. of Med. Exam'rs*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (App. 1987), *superseded by statute on other grounds*. The doctrine applies when "(1) the issue was actually litigated in the previous proceeding, (2) the parties had a full and fair opportunity and motive to litigate the issue, (3) a valid and final decision on the merits was entered, [and] (4) resolution of the issue was essential to the decision." *Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, ¶ 9, 62 P.3d 966, 968 (App. 2003). Johnston argues that all elements of collateral estoppel are present in this case, and, therefore, Allison and Creighton are precluded from relitigating the issue of his entitlement to the thirty-foot easement on

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[2]In his reply brief, Johnston argues that the thirty-foot easement was at issue in the 1996 lawsuit because the statute describing the required contents of a quiet title complaint "makes clear that the plaintiff pray for relief that the defendant be forever barred from claiming *any* right adverse to the plaintiff." *See* A.R.S. § 12-1102(5). We do not address this argument because it is waived by Johnston's failure to raise it in his opening brief. *See Nelson v. Rice*, 198 Ariz. 563, n.3, 12 P.3d 238, 242 n.3 (App. 2000).

their property. But we agree with Allison and Creighton that this issue was not actually litigated in the 1996 lawsuit.

¶13 An issue is actually litigated when it is "properly raised by the pleadings or otherwise, and is submitted for determination, and is determined." *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986), *citing* Restatement (Second) of Judgments § 27 cmt. d (1982). As we noted above, the issue of the easement on the thirty-foot portion of land was not disputed in 1996, nor was it submitted for determination. And as noted above, the trial court's finding about the thirty-foot easement did not address or resolve a material issue essential to the decision in that case. *See Campbell*, 204 Ariz. 221, ¶ 9, 62 P.3d at 968. Accordingly, Allison and Creighton are not precluded from litigating the issue of whether a thirty-foot easement existed along the north part of their property in the present lawsuit.

¶14 In sum, we conclude that Allison and Creighton's claim to quiet title in their property free of any claim by Johnston to the alleged thirty-foot easement is not barred under the doctrines of claim preclusion and issue preclusion. As these were Johnston's grounds for asserting that Allison and Creighton were not entitled to judgment as a matter of law on count one of the complaint, we find no error in the trial court's grant of summary

judgment on this count.[3] The trial court's grant of summary judgment in favor of Allison and Creighton on count one of their complaint is, therefore, affirmed.

Attorney Fees

¶15 Allison and Creighton request an award of their attorney fees and costs incurred in this appeal, pursuant to A.R.S. § 12-1103. Under that statute, a party may recover attorney fees and costs on appeal in a quiet title action if, twenty days before bringing the action, it requested the party with an apparent adverse interest to execute a quit claim deed, it tendered to the party five dollars for execution and delivery of the deed, and the party refused or neglected to comply with the request. § 12-1103(B); *see also Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 195, 840 P.2d 1051, 1060 (App. 1992). Allison and Creighton asserted in their complaint, and Johnston admitted, that they had complied with the requirements of § 12-1103(B). In our discretion, we grant Allison and Creighton's request and award them their reasonable attorney fees and costs incurred in this appeal upon their compliance with Rule 21, Ariz. R. Civ. App. P., 17B A.R.S.

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GARYE L. VÁSQUEZ, Judge

[3]We do not address any of Johnston's arguments on appeal involving the 26.4-foot strip of land, the subject of count three of Allison and Creighton's complaint, because that issue has not yet been determined. Thus, that issue is not yet ripe for appeal. *See Samaritan Health Sys. v. Superior Court*, 194 Ariz. 284, ¶ 46, 981 P.2d 584, 594-95 (App. 1998) (appellate court does not decide issue not first ruled on by trial court).

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge